

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

EAGLE WEST INSURANCE
COMPANY, a subrogee of Cypress Place
Condominium Owners Association,

Plaintiff,

v.

AMTROL, INC.,

Defendant.

CASE NO. C16-0781-JCC

ORDER

This matter comes before the Court on Plaintiff's motion to strike Defendant's experts as not timely disclosed (Dkt. No. 46). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

This case arises out of damage caused by a leaking water expansion tank at a condominium complex. (Dkt. No. 1-1 at 3.) Defendant Amtrol, Inc. manufactured the subject tank. (*Id.*) Trial was initially set for October 16, 2017, with a discovery deadline of July 7, 2017. (Dkt. Nos. 29 at 8; 15.) On June 15, 2017, Plaintiff revised its theory as to the cause of the leaking tank and subsequently disclosed an updated expert report. (Dkt. Nos. 36-1; 24-1 at 16.) On July 7, 2017, Defendant filed a motion to continue trial, based in part on the significant shift

1 in Plaintiff's case theory. (Dkt. No. 23.) The Court granted the motion and continued trial to
2 February 20, 2018. (Dkt. No. 37 at 8.) The Court also extended the discovery cutoff date to 120
3 days before the new trial date—October 23, 2017. (*Id.*)

4 Defendant has disclosed three experts. The day before the initial discovery cut-off date,
5 Defendant supplemented its discovery responses by providing a report from Amtrol engineer
6 Robert Manser and identifying him as a fact and expert witness. (Dkt. No. 29 at 8.) On the eve of
7 the new discovery cut-off date of October 23, 2017, Defendant disclosed an expert report from
8 Dr. Caliguiri and Dr. Ganot—both of whom were listed as potential liability expert witnesses in
9 Defendant's April 25, 2017 supplemental initial disclosures. (Dkt. No. 47-5 at 3.) Plaintiff now
10 moves to exclude these experts as not timely disclosed. (Dkt. No. 19.)

11 **II. DISCUSSION**

12 Parties are required to disclose an expert and her report "at the times and in the sequence
13 that the court orders," or, in the absence of a court order, 90 days before trial. Fed. R. Civ. P.
14 26(a)(2)(D).

15 The expert report of Drs. Caliguiri and Ganot was timely disclosed. (*See* Dkt. No. 37 at
16 6); *Hudson Enterprises, Inc. v. Certain Underwriters at Lloyd's London Ins. Cos.*, 855 F.3d 874,
17 877 (8th Cir. 2017) (party complied with the Federal Rules of Civil Procedure by disclosing their
18 expert on the last day allowed by the scheduling order). Plaintiff asserts that this Court's August
19 2, 2017 order continuing trial and resetting the discovery deadline "did not extend the expert
20 disclosure dates," and that Defendant was "required to disclose [expert] reports or opinions
21 before the initial July 7, 2017 discovery deadline." (Dkt. No. 46 at 5, 6.) However, neither
22 scheduling order set expert disclosure dates. (Dkt. Nos. 12; 37 at 8.) Rather, the Court set—and
23 then extended—a general discovery deadline, which Defendant met. (*Id.*)

24 Nor is there any indication that Defendant withdrew Drs. Caliguiri and Ganot as experts
25 and should thus be barred from presenting their testimony. (*See* Dkt. No. 46 at 5–6.) Plaintiff
26 argues that Defendant implicitly substituted Mr. Manser as its sole expert by failing to provide a

1 report by Drs. Caligiuri and Ganot by the original discovery deadline and by disclosing Mr.
2 Manser's report at that time. (*Id.*) Defendant identified Drs. Caligiuri and Ganot as potential
3 experts in its supplemental initial disclosures in April 2017, stating that a report would be
4 provided once experts had formed opinions and in accordance with the scheduling order. (Dkt.
5 No. 47-5 at 3.) Additional responses identifying Mr. Manser as an expert specified that the
6 responses *supplemented* previous answers. (Dkt. No. 47-3) (emphasis added). There is no basis
7 for Plaintiff's assertion that Defendant "withdrew Drs. Caligiuri and Ganot." (Dkt. No. 46 at 5.)
8 Moreover, Defendant's decision not to provide a report and opinion of these experts before July
9 7, 2017 is not entirely surprising, given the significant June 2017 shift in Plaintiff's case theory,
10 and Plaintiff's expert's updated opinion that relied on new evidence. (*See* Dkt. No. 37 at 6.)

11 Because the Court finds it appropriate to deny Plaintiff's motion to strike, it will also
12 deny Plaintiff's request for attorney fees for bringing the motion. (*See* Dkt. No. 46 at 5.)

13 **III. LEAVE TO DEPOSE**

14 While Defendant complied with the letter of the scheduling order and the Federal Rules,
15 the Court realizes that Defendant's eleventh-hour disclosure places a burden on Plaintiff, who
16 now, after the close of discovery, must obtain the Court's leave to depose the experts. *See* Fed.
17 R. Civ. P. 26(b)(4)(A) (deposition of an expert may occur only after the report is provided). The
18 Court thus *sua sponte* extends the discovery deadline until February 5, 2018 for the sole purpose
19 of providing Plaintiff the opportunity, if desired, to depose Drs. Caligiuri and Ganot.

20 **IV. CONCLUSION**

21 Plaintiff's motion to strike Defendant's experts (Dkt. No. 46) is therefore DENIED.

22 DATED this 2nd day of January 2018.

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John C. Coughenour
UNITED STATES DISTRICT JUDGE